Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

U.S. Customs Service

C.S.D. 84-63 Through 84-71

U.S. Court of Appeals for the Federal Circuit,

Appeal No. 83-1312

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 13, 1984.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
(For Director, Office of Regulations and Rulings.)

(C.S.D. 84-63)

This ruling holds that failure to comply with the legal requirements of the drawback law because of a Government regulation or ruling does not waive the responsibility of a drawback claimant to meet all statutory requirements of the drawback law. The U.S. Customs Service cannot waive a statutory requirement, in spite of the fact that the Government, acting within its powers precludes a claimant from meeting one of the statutory requirements of the drawback law. Drawback recovery is not applicable in this case, absent the applicability of the same condition drawback law. (19 U.S.C. 1313(a), 19 U.S.C. 1313(j))

Date: January 4, 1984
File: DRA-1-09-CO:R:CD:D
216378 B

Issue: May drawback be obtained on exported merchandise never subjected to manufacture pursuant to the drawback manufacturing law, 19 U.S.C. 1313(a), if such failure to manufacture the merchandise was caused by an emergency suspension order issued by the Federal Government?

Facts: A U.S. manufacturer of herbicides imported 2, 4, 5-T acid (hereinafter "acid") between March 5, and May 11, 1979. On February 28, 1979, the Environmental Protection Agency issued an emergency suspension order whereby the principal registered uses of the acid were suspended. As a result of this order, the corporation has to cease manufacture of that acid in the United States and

could not use the imported acid in the manufacture of herbicides. The corporation was able to sell some of the acid to foreign concerns. This acid, part of those shipments imported in 1979, was exported in July 1980, and December 1982. The corporation continues to hold approximately 920,000 pounds of the acid at one of its warehouses, and an appeal against the suspension order has been withdrawn by another corporation using the same acid.

The corporation now proposes to ship the 920,000 pounds of the acid to New Zealand before March, 1984, which would be prior to the expiration of the 5-year limitation for manufacturing drawback set out in 19 U.S.C. 1313(i), and claim drawback under 19 U.S.C. 1313(a).

The corporation believes it should be allowed drawback under that provision because it was precluded from using the acid in production as contemplated at the time of importation. The corporation also notes that the same condition drawback law was enacted, becoming effective December 28, 1980.

Law and analysis: The same condition drawback law applies only to merchandise entered, or withdrawn for consumption, on and after December 28, 1980. This law is patently not applicable to the acid in question.

The Customs Court has long held that the benefit of drawback is not a vested right unless there is full compliance with the drawback law in question and the applicable regulations. Stated more positively, without such compliance there can be no drawback recovery.

The courts and this Service are powerless to waive a statutory requirement. This is true even if the Government, acting within its powers, precludes a claimant from meeting one of the statutory requirements of the drawback law. The Customs Court so stated in a case involving the inability of a claimant, due to a wartime licensing requirement, to export within the statutory time limit goods manufactured with imported merchandise. *Romar Trading Company, Inc.* v. *United States,* 27 Cust. Ct. 34, C.D. 1344 (1951). The court stated the drawback provisions of the tariff act confer upon persons who wish to comply with them a privilege, not a right. *Romar, supra,* 27 Cust. Ct., at 37. See also *Swan and Finch Company* v. *United States,* 190 U.S. 143, *Nestle's Food Co., Inc.* v. *United States,* 16 Cust. Ct. Appls. 451, T.D. 43199. The right to recover drawback, i.e., receive payment, arises only when all the provisions of the statute and the applicable and lawful regulations prescribed under its authority have been complied with. *Romar, supra,* 27 Cust. Ct., at 37.

Unless the acid in this case is subjected to a manufacture or production prior to its timely exportation, drawback under 19 U.S.C. 1313(a) cannot be had. The burden of showing compliance with the law and regulations is on the claimant. *Border Brokerage Co.—A.G. Grasher* v. *United States,* 53 Cust. Ct. 6, C.D. 2465.

Holding: The answer to the question stated under Issue is no, absent the applicability of the same condition drawback law.

(C.S.D. 84-64)

This ruling holds that transaction value for spare parts withdrawn from a foreign trade zone (FTZ) in the same condition as entered may not be represented by a price derived from the importer's accounting system. Based on the information submitted by the importer concerning their accounting system, a valid transaction value cannot be obtained. Therefore, the merchandise will be appraised on the basis of one of the alternative bases of appraisement provided for in section 402 of the TAA. (Section 402(b) of the TAA)

Date: January 5, 1984
File: CLA-2 CO:R:CV:VS
543095 CW

Your memorandum of April 26, 1983, to the Carriers, Drawback and Bonds Division requests that that office address two legal issues raised in a letter, dated April 8, 1983, from the Deputy Assistant Regional Commissioner (Regulatory Audit), Northeast Region, relating to the (Company name) foreign trade subzone operations. The Carriers, Drawback and Bonds Division has asked that we respond directly to you in regard to the second issue.

As we understand the facts involved (Company name), the importer, purchases certain spare parts from unrelated suppliers in Japan and elsewhere. These parts are admitted into a foreign trade subzone in the United States in a nonprivileged foreign status where they are placed in inventory along with domestically produced spare parts. While in the subzone, the parts are tested and packed but are not processed or advanced in value in any way. Approximately 99 percent of the parts in inventory are exported to foreign countries while the remaining 1 percent of the spare parts are withdrawn from the subzone for use by the importer in the United States.

Prior to the time the parts are entered into the subzone, the importer projects or estimates its cost per part and enters this figure into its computer system as standard cost. As shipments are received at the subzone and as payments are made to the foreign suppliers for the parts, the actual part prices are recorded and at the end of the accounting period the computer arrives at an average adjustment figure between standard and actual cost. Parts withdrawn from the subzone for domestic use during the accounting period are entered at the standard cost. However, at the end of the accounting period, the adjustment figure is applied to the standard cost with respect to those parts withdrawn for domestic use during the period and an amended entry is filed which reflects the total amount actually paid for all the parts.

Counsel for the importer advises that as a result of the use of this method of accounting, it is impossible to identify or trace a particular part coming out of the subzone to a shipment which came into the subzone and, thus, to a specific invoice. We also understand that this system is not structured so as to permit the assignment of values to parts which are removed from the subzone on a first-in, first-out basis. According to the importer, it is not "feasible" to alter its system for the purpose of accomplishing either of the above two objectives. Counsel maintains that transaction value exists for the spare parts on the basis of values derived from the importer's process of reconciling standard to actual cost. Counsel further states that Customs is prohibited by section 402(g)(3) of the TAA from rejecting this accounting system.

The Deputy Assistant Regional Commissioner states that transaction value should be represented by the invoice price of the parts and that if it is not possible under the importer's system to determine such a price, then transaction value should be precluded as the proper basis of appraisement. The Deputy Assistant Regional Commissioner orally advised a member of my staff that our ruling should also consider the propriety of requiring the importer to alter its accounting method so that an acceptable transaction value can be determined.

Transaction value, the primary basis of appraisement under the TAA, is defined in section 402(b) of the TAA as "the price *actually* paid or payable for the merchandise when sold for exportation to the United States," plus amounts for certain items not already incuded in that price (emphasis added).

Under the circumstances of this case, it is clear that when the standard price for a particular spare part is adjusted at the end of an accounting period, the resulting adjusted price is not, except coincidentally, equal to the invoice price for that specific part. Rather, the adjusted price determined pursuant to the importer's accounting system represents the average price paid for all parts of that type during the accounting period. In our opinion, such a price does not satisfy the requirement that it be the price *actually* paid or payable for the merchandise, within the meaning of section 402(b)(1). Thus, transaction value for the spare parts may not be represented by a price derived from the importer's accounting system.

Section 402(g)(3) of the TAA, which is the provision the importer claims prohibits Customs from rejecting the importer's accounting system, states that:

> * * * information that is submitted by an importer, buyer, or producer in regard to the appraisement of merchandise may not be rejected by the Customs officer concerned on the basis of the accounting method by which that information was prepared, if the preparation was in accordance with generally accepted accounting principles.

We wish to stress in this regard that we are not "rejecting" the importer's accounting system. That system appears to be in accordance with generally accepted accounting principles and the importer, in our view, has every right to utilize that system. However, the value information which is derived from that system is being rejected as the basis on which a proper transaction value may be determined *not* because of the accounting method used but because the values derived therefrom are not in conformance with the definition of transaction value set forth in section 402(b).

Concerning whether Customs has the authority to require an importer to alter its accounting procedures so that an acceptable transaction value may be obtained, it is our opinion that no such authority exists. Section 402 of the TAA sets forth six possible methods of valuation in sequential order of application. If transaction value cannot be ascertained on the basis of the information submitted by the importer, Customs is required by the TAA to resort to the first of the remaining bases of appraisement that can be determined. In our view, little or no purpose would be served in having alternative bases of appraisement if importers can be required to restructure their accounting systems so that transaction value can be found in nearly every case.

To summarize the foregoing, we believe that no transaction value can be found for the spare parts based on the value information derived from the importer's accounting system. It will be necessary, therefore, to appraise the merchandise on the basis of one of the alternative bases of appraisement provided for in section 402. It is also our opinion that no authority exists under the TAA to require importers to restructure their accounting systems for the purpose of deriving value information from which valid transaction values may be obtained.

(C.S.D. 84-65)

This decision holds that equipment which, when used, fails to operate because of defects does not render same condition drawback inapplicable (19 U.S.C. 1313(c))

Date: January 6, 1984
File: DRA-1-CO:R:CD:D
216556 B

Re: Your Letters of December 12 and 13, 1983—Accelerated Drawback for Rejected Merchandise—Same Condition Drawback

This is in reply to your referenced letters.

Any use of an article for its intended use renders the same condition law inapplicable. See C.S.D. 81-222. If a piece of equipment or a tool, etc., is put to its intended use and is found not to perform satisfactorily for any reason, that equipment or tool has nonetheless been used. If the failure to perform is due to failure to meet

one or more specifications, the proper avenue to obtain drawback is under the rejected merchandise provision, 19 U.S.C. 1313(c).

On the other hand, if the failure to meet specification(s) renders the equipment or tool incapable of use, then same condition drawback will apply assuming all requirements of the law and applicable regulations are met. In short, attempted use for intended purpose does not normally render the same condition law inapplicable; use for such purposes, however unsatisfactory the results, does render that law inapplicable.

Accelerated payment applies to both same condition drawback and rejected merchandise drawback per 19 CFR 191.72(a). Naturally, because rejected merchandise must be returned to Customs custody before exportation, the value of accelerated payment for this type of drawback is probably marginal, assuming prompt liquidation.

(C.S.D. 84-66)

This ruling holds that a solid-state electronic wrist watch and radio combination equipped with an earphone is classifiable as a single entity under the provision for other radiotelephonic transmission and reception apparatus in item 685.24, TSUS

Date: January 9, 1984
File: CLA-2 CO:R:CV:VS
067828 SC

We have your letter of May 24, 1982, on behalf of (Company name) concerning the tariff classification of a radio with a solid-state watch. It is assumed that the merchandise is a product of South Korea.

The subject merchandise is depicted as a solid-state electronic wrist watch and radio combination equipped with an earphone. Descriptive literature was submitted. The importer claims that the merchandise is a "time piece with special features" classifiable under item 688.45, Tariff Schedules of the United States (TSUS), pursuant to *Texas Instruments, Inc.* v. *United States,* Slip Op. 81-31 (1981) *aff'd* Appeal No. 81-23 (1982), or as a machine not specially provided for under item 678.50, TSUS, because it is more than a watch or a radio. In any case, the importer further claims that the merchandise is not classifiable in item 685.24, TSUS.

In our letter 070215, I.A. 99/82, dated November 29, 1982, we held that solid-state wrist watches incorporating watch-bands were classifiable as a single entity under item 688.45, TSUS, as electrical articles not specially provided for (now 688.36, TSUS).

We note that even though the merchandise does not contain a speaker, one listens to the radio through the included earphone. In this case the earphone serves as a speaker, and the product is thus considered as a single entity.

Schedule 7, part 2, subpart E, headnote 1(iv), TSUS, provides:

> 1. This subpart covers watches and clocks, time switches and other timing apparatus with clock or watch movements, and parts of these articles. This subpart, however, does not cover—
>
> * * * * * * *
>
> (iv) Combination articles provided for elsewhere in the tariff schedules;

Item 685.24, TSUS, provides as follows:

> Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks, or other timing apparatus and parts thereof:
>
> * * * * * * *
>
> Other:
>
> Solid-state (tubeless) radio receivers:

685.24	Other	8.2 percent ad valorem

The court said in *American Rusch Corp.* v. *United States,* 74 Cust. Ct. 153, C.D. 4599 (1975) that it is well established that the basic rule of construction applicable to any case involving the construction of a statute is that the intent of Congress is to be given effect. *United States* v. *Simon Saw & Steel Co.,* 51 CCPA 33, 40, C.A.D. 834 (1964); *United Metal Goods Mfg. Co.* v. *United States,* 46 CCPA 120, 122, C.A.D. 712 (1959). The "first most obvious" method of ascertaining Congressional intent is to examine the statute itself, *Simon Saw & Steel,* 51 CCPA at 40. See also *United States* v. *Border Brokerage Co.,* 48 CCPA 10, 13, C.A.D. 754 (1960); *A. W. Fenton Co.* v. *United States,* 55 CCPA 54, 58, C.A.D. 933 (1968). Where the language of the tariff provision in issue is free of ambiguity, resort to extrinsic aids of construction, such as legislative history is unwarranted. *J. E. Bernard & Co.* v. *United States,* 57 CCPA 52, 58, 420 F.2d 1403, 1407, C.A.D. 975 (1970); *Air Express International Agency, Inc.* v. *United States,* 53 CCPA 11, 14, C.A.D. 869 (1966).

Further, in *American Customs Brokg. Co., Inc., a/c Hamakua Mill Co.* v. *United States,* 58 CCPA 45, 48, C.A.D. 1002, 433 F.2d 1340, 1341 (1970), the appellate court stated:

> Regardless of what may have been intended by item 666.20, we cannot ignore the fact that the invasionary headnote to subpart A is applicable to all of part 4, including item 666.20.

> We cannot use an indication of Congressional intent alone to overcome the clear meaning of the words of a statute.

The plain meaning of the statute seems to be all inclusive. "Radiotelegraphic and radiotelephonic transmission and reception apparatus * * *; all the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof" includes all such articles and any combination of the articles specified which incorporate clocks or other timing apparatus. Had Congress intended to exclude the named articles incorporating certain timing apparatus from classification under the superior heading in question, it would have specifically said so. We see no intent to exclude the merchandise under consideration from classification here.

CIE 1/64, page 564 states that headnote 1(iv) refers to combination articles provided for elsewhere in the tariff schedules. Previous mention has been made of the anomalous classification practices involved with respect to these articles. In the proposed schedules specific provisions have been made for some of the more significant combination articles presently moving in commerce. The considerations which went into the establishment of such provisions are treated in the parts of the proposed schedules where such combination articles are provided for. Headnote 1(iv), schedule 7, part 2, subpart E makes reference to combination articles provided for elsewhere. As indicated above, Congress was attempting to correct the anomalous classification practice involving these articles. It is clear, therefore, that item 685.24, TSUS, was intended to cover such combination articles. As the court of Customs and Patent Appeals said in *American Customs Brokg.* case, *supra:* "We cannot use an indication of Congressional intent alone to overcome the clear meaning of the words of a statute."

The superior heading "Radio and radiotelephonic transmission, and reception apparatus * * * all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus and parts thereof" covers radio receivers in all forms, shapes, and housings. The fact that a product is in a housing adaptable to the wrist has little, if any, effect on classification where the merchandise meets the basic definition of a radio receiver.

We note that while combination articles containing watch or clock movements were separately classifiable under paragraphs 367(a) and 368(a), Tariff Act, 1930, there were no satisfactory statutory lines of demarcation as to whether the movement would be under paragraph 367(a). Section 53 of the House Report on the Tariff Schedules Technical Amendments Act of 1965, states in part:

* * * * * * *

> Treatment under the tariff schedules of the United States. In the TSUS, an effort was made to treat specifically with the known popular forms of the combination articles in question

which had previously been the subject of the aforementioned customs practice in item 685.50 (clock-radios), item 711.65 (barometer-thermometer-clock, etc.) and items 756–02–10 (lighter-watch).

It is evident that Congress intended to clarify the confusion created by classifying these types of combination articles under the Tariff Act of 1930, by providing for those involving radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus * * * in item numbers under the superior heading in the tariff schedules incorporating such language. This is so whether or not such articles contain a timing apparatus.

On the basis of the foregoing, we conclude that the merchandise described as a solid-state wrist watch with radio is classifiable as a single entity under the provision for other radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, * * *, all the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof in item 685.24, TSUS, dutiable at the rate of 8.2 percent ad valorem.

(C.S.D. 84–67)

This ruling holds that refunds made or effected after the date of importation may not be used to reduce the transaction value of merchandise (19 U.S.C. 1401a(b)(4)(B)

Date: January 9, 1984
File: CLA–2 CO:R:CV:V
543246 BNS

In your letter of January 6, 1984, you indicate that your client, (Company Name) purchases sweaters from a related manufacturer in Guam. The purchases are made on an FOB, Guam basis, the merchandise is appraised under transaction value, and is accorded duty-free treatment under General Headnote 3(a), Tariff Schedules of the United States (TSUS).

You indicate that on several occasions during the past year, the manufacturer was unable to make timely delivery of the goods. In these instances it was necessary for your client to ship the goods by air, rather than by sea as originally contemplated at the time of the contract.

The manufacturer has agreed to refund to your client the difference between the sea and air freight for the above goods. However, you client is concerned that if this difference is deducted from the appraised value of the merchandise, the goods might not qualify for duty-free entry under General Headnote 3(a), TSUS. You have requested that the refund be ruled as not deductible from the transaction value of the merchandise.

Section 402(b)(4)(B) of the Trade Agreements Act of 1979 (19 U.S.C. 1401a(b)(4)(B)) provides:

> Any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of importation * * * shall be disregarded in determining the transaction value under paragraph (1).

In the current case it appears from the facts presented that the manufacturer agreed to effect a refund, based upon the difference between air and sea freight, only after the merchandise had been imported into the United States. Based upon the above stated facts, under the cited statutory provision, the transaction value of the merchandise may not be reduced to take account of the manufacturer's refund.

(C.S.D. 84-68)

This ruling holds that shipping charges of consigned components may be reported as uniform percentile shipping burden rather than as actual costs

Date: January 25, 1984
File: CLA-2 CO:R:CV:V
543224 MK

This refers to your letter of November 23, 1983, on behalf of (Company name) (hereinafter, the importer), in which you request our approval of a proposed method of reporting the dutiable transportation costs associated with the shipment of consigned components, instead of reporting the actual costs associated with a particular entry.

You advise that many articles produced abroad to the importer's specifications contain components that it furnishes to the producers free of charge and exclusively for use in such production. You describe the present methods of reporting the shipping charges and state that it is becoming increasingly difficult to isolate the shipping charges applicable to the consigned components in a given entry as the overseas operations grow in number and complexity.

A particularly troublesome aspect of computing shipping costs occurs when the identical component is sourced from both the United States and overseas and such components are commingled in the materials inventory of the overseas producer of the imported merchandise because, you explain, the importer purchases foreign components on a CIF delivered basis, while it purchases domestic components FOB port of exportation. There are also variations in the shipping charges for components purchased overseas.

To avoid the utilization of a burdensome and costly recordkeeping system solely for identifying relatively low value shipping charges on an entry-by-entry basis, you request our permission to

implement the following proposal which would apply *only* to the importation of electronic articles and subassemblies for electronic articles.

You propose to use a uniform percentile shipping burden, to be applied against the value of all consigned components in a given shipment. To arrive at such percentile burden, the importer isolated a random 4 month period during the current calendar year. The value of all shipments of components of U.S. origin utilized in the overseas production of electronic articles and subassemblies in Taiwan, Hong Kong, and Japan during this period was ascertained, as were the total shipping costs applicable to those components. These amounts were obtained directly from the commercial invoices, bills of lading, or pro forma freight invoices, located in the importer's traffic department and available for inspection.

For the period in question, total freight charges were $198,555.00, while the total value of the components themselves was $7,001,831.00, resulting in a relative value of shipping charges to component values of 2.836 percent.

As an example of how the percentile burden would be applied, assume an import entry invoiced at $40,000.00, with a total value of consigned components, exclusive of freight charges, valued at $10,000.00. (All of the importer's purchases of electronic articles and subassemblies from abroad are from unrelated parties and it is assumed that the merchandise would be appraised in accordance with its transaction value—invoice price plus statutory additions.) By applying the freight burden of 2.836 percent, the total dutiable value of the entry would be $50,283.60 [$40,000.00 plus $10,000.00 plus (2.836 x $10,000.00)]. (Consistent with the method of its calculation, the burden would be applied against the value of the consigned components only.)

While components sourced abroad have not been considered in the burden calculation, under the proposal *all* consigned components, regardless of origin, will be subject to the aforesaid burden. Accordingly, Customs is assured that it will be receiving all duties associated with transportation charges.

Although the proposal will probably result in some overpayment of duties, this is acceptable to the importer because, on an annual basis, duties owing in connection with "assist" freight charges are relatively minimal. Moreover, acceptance of the proposal will obviate the need for the importer to maintain costly and highly complex recordkeeping and reporting systems and will provide the company with the peace of mind of knowing it is in compliance with the law.

As a final aspect of the proposal, the importer will verify the ongoing accuracy of the burden rate by performing the same calculation as described above, on an annual basis, or more frequently if the Government deems it appropriate.

You argue that this proposal is wholly consistent with the legislative intent in enacting the Trade Agreements Act of 1979 and the valuation statute embodied therein. The proposal is based upon actual historical cost data rather than estimates, is limited to a single product sector, is based upon generally accepted accounting principles, and insures protection of the revenue. You submit a detailed argument in support of your position, but we see no need to discuss it at length in view of our decision.

We agree with you that the proposal conforms to generally accepted accounting principles and the Statement of Administrative Action which, in pertinent part, states that:

> Additions to the price actually paid or payable for the value of assists shall be based on information that establishes the accuracy of the addition. In order to minimize the burden of both the importer and the Customs Service in determining the value to be added, information available in the buyer's commercial record system will be used to the greatest extent possible.

Accordingly, we approve the use of the proposed method of calculating the shipping charges of consigned components, with the caveat that if, after the proposal is implemented, a district director advises us that it presents him with legal or operational problems, we might need to modify our general approval of the proposal. We would not do so before advising you and attempting to reach a mutually satisfactory agreement.

This ruling will be distributed to all ports, to assure uniform appraisement.

(C.S.D. 84-69)

This ruling holds that a country of origin marking on the underside of the valve handle of a shut-off valve is not conspicuous enough to satisfy the requirements of 19 U.S.C. 1304. This decision becomes effective 45 days after publication in the CUSTOMS BULLETIN

Date: January 31, 1984
File: Mar 2-05 CO:R:E:E
723460 HL

This ruling concerns the country of origin marking of imported shut-off valves.

Issue: Whether a country of origin marking on the underside of the valve handle of a shut-off valve is conspicuous enough to satisfy 19 U.S.C. 1304.

Facts: The Customs Service has examined an imported shut-off valve with a country of origin marking permanently affixed to the underside of the valve handle by cast-in-the-mold lettering. A shut-off valve of the kind in question is routinely installed beneath

sinks and toilets to control the supply of water to the fixture. We believe that the valves are sold in hardware stores or plumbing supply outlets, in single polyethlene pouches or loosely in bins.

Law and analysis: Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides in general that, unless excepted, all articles of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to the ultimate purchaser in the United States.

Cast-in-the-mold lettering is permanent, but difficult to see on the underside of the valve handle, especially if the shut-off valve is sold in a polyethylene bag which tends to be opaque. On the other hand, raised lettering on the valve body or topside of the handle may not be preferred by the manufacturer who may require a flat surface for plating and polishing. Indeed, such lettering may be obscured by such finishing operations.

Accordingly, it is our position that marking the underside of the value handle is not conspicuous enough to satisfy 19 U.S.C. 1304. Customs will require that either the value body or topside of the valve handle be marked with the country of origin even though a less permanent method of marking is used, *i.e.,* a paper adhesive label. If a paper adhesive label is used, it must remain on the value through normal distribution and handling until it reaches the ultimate purchaser in the United States.

This ruling will be effective forty-five (45) days from the date this ruling is published in the CUSTOMS BULLETIN.

Holding: A country of origin marking on the underside of the valve handle of a shut-off valve is not conspicuous enough to satisfy 19 U.S.C. 1304.

(C.S.D. 84-70)

This ruling holds that honey imported from various Caribbean countries is classifiable in item 155.70, TSUS and is eligible for duty-free treatment provided that all requirements set forth in the regulations governing qualification for duty-free treatment under the Caribbean Basin Initiative (CBI) are met

Date: February 13, 1984
File: CLA-2 CO:R:CV:V
071749 FF

This is in reply to your letter dated January 25, 1984, concerning the importation of honey from various Caribbean countries.

You indicate that your company purchases considerable quantities of honey produced from native bees in Honduras, El Salvador, Guatemala, and the Dominican Republic; the honey in each case is extracted from the comb and strained through mesh before being packed in drums for shipment to the United States. You state your

understanding that the honey, classifiable in item 155.70, Tariff Schedules of the United States, may be imported duty-free, and you request confirmation of this as well as clarification as to whether the related regulations published in the Federal Register on January 5, 1984, now have the effect of law.

On November 30, 1983, the President signed Proclamation 5133 which implements the duty-free aspects of the Caribbean Basin Economic Recovery Act, 19 U.S.C. 2701–2706, commonly referred to as the Caribbean Basin Initiative (CBI). The Proclamation provides for duty-free treatment on all eligible articles from any designated beneficiary country which are entered, or withdrawn from warehouse for consumption, on or after January 1, 1984, and on or before September 30, 1995; this Proclamation also designates the Dominican Republic as a beneficiary country for purposes of the CBI. On December 29, 1983, the President signed Proclamation 5142 which amends the earlier Proclamation in order to, *inter alia*, designate additional beneficiary countries which include Honduras, El Salvador, and Guatemala. The regulations to which you refer set forth the specific requirements which must be followed in order to obtain duty-free treatment under the CBI; those regulations are presently in effect as interim regulations and will be republished as final regulations following the 60-day public comment period provided for in the Federal Register notice.

Since the countries which are the source of the honey in question have been designated as beneficiary countries for purposes of the CBI, and in consideration of the fact that the honey in each case appears to be wholly the growth, product, or manufacture of one of those countries and is not specifically precluded from CBI duty-free treatment, the honey will be eligible for duty-free treatment provided that all requirements set forth in the implementing regulations are met. We have enclosed for your reference a copy of the CBI regulations, and we draw your specific attention to sections 10.193 and 10.194 which concern the direct importation requirement and to section 10.198 which sets forth the requirements concerning evidence of country of origin.

(C.S.D. 84-71)

This ruling holds that the temporary importation of certain railroad cars from Canada under item 864.40, TSUS, to meet emergency needs, is approved

Date: February 15, 1984
File: CON-1-CO:R:CD:D
216641 R

Mr. Eugene J. Sullivan, Jr.,
Massachusetts Bay Transportation Authority, 50 High Street, Boston, Massachusetts 02110

Dear Mr. Sullivan: This is in reply to your letters of January 13, and 23, 1984, and an undated letter that we received on February 3, 1984, requesting approval to entering rail cars free of duty under item 864.40, Tariff Schedules of the United States (TSUS). You furnished evidence with those letters in compliance with our notice that was published as T.D. 83-141 in the Federal Register (48 F.R. 28982) on June 24, 1983.

It is understood that the cars are to be temporarily imported into the United States to meet an emergency situation on the Boston commuter rail system caused by highway construction and a fire to another line's railroad station. It is further understood that the lease contains no purchase agreement to buy the foreign-owned cars.

We agree that the evidence shows the existence of an emergency which can be met best with the use of cars on a temporary basis. We find that your attempts to buy or lease domestic cars have been unsuccessful in terms of meeting the emergency. Accordingly, your request to import temporarily certain railroad cars from Canada under item 864.40, TSUS, is approved.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 83-1312)

HENSEL, BRUCKMANN & LORBACHER, INC., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided June 8, 1984)

Saul Davis, of New York, New York, argued for appellant. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Patrick D. Gill, of New York, New York, argued for appellees. With him on the brief was *John S. Rode*.

Appealed from: U.S. Court of International Trade.

Judge RAO.

Before RICH, KASHIWA, and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

In this customs valuation case appellant, the United States (Government), appeals from a judgment of the United States Court of International Trade (trial court), concerning the appraisement of industrial sewing machine needles imported by appellee, Hensel, Bruckmann & Lorbacher, Inc. (Hensel). We affirm.

ISSUES

The Government raises four issues before this court, contending that the trial court: (1) Committed reversible error in permitting the introduction of certain affidavits and letters; (2) erred in finding no freely offered price for certain sewing machine needles; (3) erred in finding no freely offered price for certain similar sewing machine needles; and (4) erred in entering judgment without a finding that the claimed export values for certain needles were correct.

BACKGROUND

We do not repeat here the factual and statutory background which the trial court set forth in its opinion.[1] We note that this

[1] *Hensel, Bruckmann & Lorbacher, Inc.* v. *United States*, 569 F. Supp. 849 (C.I.T. 1983).

case concerns industrial sewing machine needles which Hensel, a U.S. customs broker, imported from a West German manufacturer, Ferd. Schmetz GmbH (Schmetz), during the period 1975–80. The United States Customs Service (Customs) appraised these needles using foreign value, whereas Hensel claims, and the trial court agreed, that the needles should have been appraised using export value.[2]

OPINION

We note first that our standard of review of questions of fact is "clearly erroneous" and of questions of law is "not entitled to the deference we [exercise]" with questions of fact.[3]

1. The Affidavits and Letters

The Government first contends that the trial court committed reversible error in permitting the introduction of certain affidavits and evidence from "persons whose attendance [at trial] cannot reasonably be had." [4] In particular, the Government claims that the evidence so introduced was from the alleged real party in interest, the German manufacturer of industrial sewing machine needles, Schmetz, as opposed to the customs broker and importer of record, Hensel, whom the Government denominates a "paper plaintiff." Accordingly, the Government theorizes that its statutory right to cross-examine the other party's witnesses and to rebut its evidence [5] has been prejudiced.

We do not agree. The trial court has broad discretion under section 2639(c)(1) to determine the factual issue whether attendance of witnesses or deponents "cannot reasonably be had." Moreover, that provision refers to "persons," making no distinction between parties and nonparties, much less between "real" parties and "paper" parties. We have thoroughly reviewed the record in this case and find no reason to disturb the trial court's factual finding on the availability of those witnesses. For example, it developed that one critical witness, Mr. Applerath, was retired, of advanced age, and no longer under Schmetz' control. Another key Schmetz witness, Dr. Hagen, would have appeared at the trial noticed for July 29, 1981, but the Government opposed this date. We therefore find no clear error and affirm the trial court's finding.

Likewise, we have reviewed the record as regards the Government's subpoint that the Kuhn affidavit and the two Liebold letters were not admissible because they were not properly sworn "affidavits" as contemplated by section 2639(c)(1). The former affidavit was duly sworn before a West German notary, as was the second of

[2] *See Hensel*, 569 F. Supp. at 850, setting forth the applicable statutory definitions of "foreign value" and "export value" found in 19 U.S.C. § 1402 (1976) (repealed 1979).

[3] *Daw Indus., Inc. v. United States*, 714 F.2d 1140, 1142 (Fed. Cir. 1983).

[4] 28 U.S.C. § 2639(c)(1) (1982).

[5] 28 U.S.C. § 2641(a).

the Liebold letters, which was essentially identical to the first. Moreover, the statute specifically excepts application of the Federal Rules of Evidence, including the rules pertaining to authentication of foreign documents to which the Government cites us, in this situation.[6] The trial court, in weighing the probative value to be given all of this "section 2639(c)(1)" evidence, has properly taken into account these concerns.[7]

2. The Freely Offered Price for Schmetz' Needles

Secondly, the Government attacks the trial court's holding that there was no freely offered price to all purchasers in West Germany for Schmetz' needles. The Government emphasizes that the price must be the freely "offered" price under the pertinent statute,[8] as opposed to the actual sales price. In this regard the Government focuses on Schmetz' offered prices to end users in the West German market, arguing that Schmetz' issued price lists constituted such offers, even though the end user may have actually paid a dealer.

The Government's position does not correspond to the facts, however, either as found by the court below or as evidenced in the ruling of Customs' Classification and Value Division. The trial court found persuasive Hensel's position that Schmetz restricts its offers for sales to end users through its dealers because Schmetz selects and monitors those dealers, rather than offering needles for sale to any and all dealers or distributors.[9] Customs also found, in its ruling dated June 28, 1979 (plaintiff's exhibit 22 in the record below), that Schmetz restricted its dealers as to sales territory and resale prices.[10] Our review of the record likewise leads us to conclude that, based on the facts in that record, the trial court correctly applied the law, and we affirm the trial court on this point.

3. The Freely Offered Price for Similar Needles

Thirdly, the Government contends that the trial court erred in finding no freely offered price for the sale of *similar* needles in West Germany. It bases its contention in part on an attempt to exclude or discredit the affidavits, which we have discussed above, and in part on evidence that Lammertz, Schmetz' main competitor in West Germany, had long taken the position before Customs that its needles were freely offered for sale in West Germany. The trial court fully considered the Government's evidence, offered in rebuttal to the prima facie case which Hensel established that Lammertz did indeed restrict the manner in which it offered its needles

[6] 28 U.S.C. § 2641(a).
[7] Hensel, 569 F. Supp. at 852.
[8] 19 U.S.C. § 1402(c) (1976) (repealed 1979).
[9] *Hensel*, 569 F. Supp. at 851.
[10] Customs nevertheless concluded that foreign value existed because Schmetz made some direct sales to end users at list prices. The trial court rejected these sales after finding that they were "for less than the usual wholesale quantities." *Hensel*, 569 F. Supp. at 851.

for sale in West Germany.[11] Our review of the record indicates no error in that holding, and we affirm.

4. The Judgment

Finally, the Government claims that the trial court erred in entering judgment against the Government because there was no finding that Schmetz' claimed export values for the needles were correct. This is flatly contradicted by the record, wherein the Government stipulated to the use of the specified Schmetz export price lists, should Hensel prevail on export value. We therefore affirm the trial court on this final issue as well.

AFFIRMED

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[11] *Id.* at 852.

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